

EXHIBIT A
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan van Keulen, Magistrate Judge

PATRICK CALHOUN, et al., on behalf of themselves and all others similarly situated,)	UNDER SEAL BY ORDER OF THE COURT
Plaintiffs,)	
VS.)	NO. C 20-05146-SVK
GOOGLE LLC,)	C 20-03664-SVK
Defendant.)	

San Francisco, California
Thursday, August 12, 2021

SEALED BY ORDER OF THE COURT

TRANSCRIPT OF REMOTE VIDEOCONFERENCE PROCEEDINGS

APPEARANCES: (Appearances via Zoom videoconference.)

For Plaintiffs:

BLEICHMAR, FONTI & AULD LLP
555 12th Street - Suite 1600
Oakland, California 94607
BY: LESLEY E. WEAVER
ATTORNEY AT LAW

DICELLO LEVITT & GUTZLER LLC
One Grand Central Place
60 East 42nd Street - Suite 2400
New York, New York 10165
BY: DAVID A. STRAITE
ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Ruth Levine Ekhaus, RMR, RDR, FCRR
Official Reporter, CSR No. 12219

1 **APPEARANCES: (CONTINUED)**

2 For Plaintiffs:

3 SIMMONS HANLY CONROY LLC
4 112 Madison Avenue - 7th Floor
5 New York, New York 10016

6 BY: **JASON "JAY" BARNES**
7 ATTORNEY AT LAW

8 SUSMAN GODFREY LLP
9 1301 Avenue of the Americas
10 32nd Floor
11 New York, New York 10019

12 BY: **ALEXANDER P. FRAWLEY**
13 ATTORNEY AT LAW

14 SUSMAN GODFREY LLP
15 1901 Avenue of the Stars - Suite 950
16 Los Angeles, California 90067

17 BY: **AMANDA K. BONN**
18 ATTORNEY AT LAW

19 BOIES, SCHILLER & FLEXNER LLP
20 44 Montgomery Street - 41st Floor
21 San Francisco, California 94104

22 BY: **BEKO OSIRIS RA REBLITZ-RICHARDSON**
23 **HSIAO C. MAO**
24 ATTORNEYS AT LAW

25 BOIES SCHILLER & FLEXNER LLP
100 SE 2nd Street - Suite 2800
Miami, Florida 33131

17 BY: **JAMES W. LEE**
18 ATTORNEY AT LAW

19 MORGAN & MORGAN
20 One Tampa City Center
21 201 North Franklin Street - 7th Floor
22 Tampa, Florida 33602

23 BY: **RYAN McGEE**
24 ATTORNEY AT LAW

1 APPEARANCES: (CONTINUED)

2 For Defendant:

3 QUINN, EMANUEL, URQUHART
4 & SULLIVAN LLP

5 865 South Figueroa Street - 10th Floor
6 Los Angeles, California 90017

7 BY: VIOLA TREBICKA
8 STEPHEN A. BROOME
9 ATTORNEYS AT LAW

10 QUINN EMANUEL URQUHART
11 & SULLIVAN, LLP

12 191 N. Upper Wacker Drive - Suite 2700
13 Chicago, Illinois 60606

14 BY: ANDREW H. SCHAPIRO
15 TEUTA FANI
16 ATTORNEYS AT LAW

17 QUINN, EMANUEL, URQUART
18 & SULLIVAN LLP

19 51 Madison Avenue - 22nd Floor
20 New York, New York 10010

21 BY: JOMAIRE A. CRAWFORD
22 JOSEF T. ANSORGE
23 ATTORNEYS AT LAW

24 Also Present: Douglas A. Brush, Special Master

UNDER SEAL BY ORDER OF THE COURT

1 Thursday - August 12, 2021

9:33 a.m.

2 P R O C E E D I N G S

3 ---oo---

4 **THE CLERK:** This is a sealed hearing in Case
5 20-cv-3664, Brown, et al. versus Google LLC, et al., and case
6 20-cv-5146, Calhoun et al. versus Google LLC.

7 Counsel, please identify yourselves for the record and
8 we'll start with plaintiffs.

9 **MS. BONN:** Good morning, Your Honor. This is Amanda
10 Bonn representing the Brown plaintiffs.

11 **THE COURT:** Good morning. I have so many people on
12 the screen, that it will be helpful when you announce
13 yourselves to give a wave so something for both me and the
14 court reporter. That will be helpful.

15 (Court reporter interruption.)

16 **THE COURT:** All right. Ms. Bonn got us started, so
17 who is next?

18 **MR. MAO:** Good morning, everyone. This is Mark Mao of
19 Boies, Schiller, Flexner, also for the plaintiffs.

20 **THE COURT:** Good morning.

21 **MR. RICHARDSON:** Good morning. Beko Richardson,
22 Boies, Schiller, Flexner, on behalf of plaintiffs.

23 **THE COURT:** Good morning.

24 **MR. LEE:** Good morning. James Lee, Boies, Schiller &
25 Flexner on behalf of plaintiffs.

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1 THE COURT: Mr. Lee, good morning.

2 Anyone else?

3 MR. FRAWLEY: This is Alexander Frawley from Susman
4 Godfrey on behalf of the Brown plaintiffs.

5 MR. McGEE: Good morning, Your Honor. Ryan McGee from
6 Morgan & Morgan on behalf of the plaintiffs.

7 THE COURT: Good morning.

8 Anyone else for Brown plaintiffs today? All right.

9 MS. BONN: That's it, Your Honor.

10 THE COURT: Let's, again, the defense appearance,
11 please.

12 MR. SCHAPIRO: Good morning, Your Honor. This will be
13 for both Brown and Calhoun, so we can do it again if you wish,
14 but I'm Andrew Schapiro for Google.

15 And maybe it's simplest if I just introduce my colleagues,
16 who can then wave. I'll go in the order in which they appear
17 in my Zoom screen, unless you would prefer them each to
18 introduce themselves.

19 THE COURT: That will be fine, as long as I get the
20 wave. That's the important thing.

21 MR. SCHAPIRO: Okay. My colleague Teuta Fani, who
22 goes by "Tea."

23 THE COURT: Ms. Fani, good morning.

24 MR. SCHAPIRO: For Google. Then we have Viola
25 Trebicka.

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1 THE COURT: Ms. Trebicka, good morning.

2 MR. SCHAPIRO: Steve Broome. And -- oh, I skipped
3 Joey. Josef Ansorge, who goes by "Joey."

4 THE COURT: Mr. Ansorge, good morning.

5 MR. SCHAPIRO: And Jomaire Crawford.

6 THE COURT: And where is Ms. Crawford? There she is.
7 All right. Good morning.

8 All right. And the Calhoun plaintiffs, please.

9 MS. WEAVER: Good afternoon, Your Honor. Lesley
10 Weaver of Bleichmar, Fonti & Auld.

11 THE COURT: Good morning.

12 MR. BARNES: Jay Barnes of Simmons, Hanly, Conroy.

13 THE COURT: Good morning.

14 MR. STRAITE: And good morning, Your Honor. David
15 Straite for the Calhoun plaintiffs.

16 THE COURT: Good morning.

17 Anyone else for the Calhoun plaintiffs?

18 (No response.)

19 THE COURT: All right.

20 And our appearances for the defendants are in, as the
21 same. Thank you.

22 All right. Additionally, for logistics, if you're not
23 speaking, or -- I appreciate there are certain, perhaps, team
24 leaders who don't want to be off video, any more than you would
25 step aside from counsel table if we were my courtroom, I

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1 understand. But if you're -- otherwise if you're not speaking,
2 if you would turn off your video until we get to your matter.
3 We have a lot of ground to cover. Again, that will just help
4 me and the court reporter better manage who we're talking to.
5 And I appreciate that. Thank you.

6 I know everyone makes a contribution in this case. And
7 some of you aren't even appearing. Some of you are in the
8 gallery. I know the work it takes to manage and run and
9 actually litigate cases of this size. And I know that the
10 contributions are vast. So I'm asking you to turn off your
11 video. I'm not minimizing your role at all and I do look
12 forward to hearing from those who will be speaking today.

13 Okay. Oh -- and our special master, Mr. Brush?

14 Ms. Fanthorpe, is he here? Is he in the gallery?

15 **MR. BRUSH:** I am, Your Honor.

16 **THE COURT:** All right. Thank you, Mr. Brush.

17 Let's go ahead and bring him in as a panelist. Just -- I
18 want to be sure everyone is aware Special Master Brush is here,
19 and he and I have conferred on a couple of the matters that are
20 pending, and we'll get to that in due course.

21 And there we go. Excellent. Okay.

22 So where we're going to start today -- here is actually
23 what we will be covering, we're going to start with the
24 discovery schedules in this case. I have conferred with
25 Judge Koh, and I have proposed to her a very modest adjustment,

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1 which she has indicated she will accept.

2 Following this adjustment, the parties will need to file a
3 stipulation with her in each case reflecting these dates and if
4 these impact dates -- further dates beyond the fact discovery
5 cut-off, you'll need to include that in your proposal to her as
6 well, but she is expecting that.

7 After we address the discovery schedule, we'll turn to a
8 couple of matters that I believe are appropriately referred to
9 Special Master Brush, and then we will turn to the proposed
10 cross-use agreement between the parties. And then we will take
11 up the Brown disputes that have been identified as priorities,
12 and that is the ESI dispute and then the Google deposition
13 issue.

14 Then we will turn to the Calhoun-specific matters starting
15 with the Calhoun ESI dispute, and then the issues that Google
16 has raised in Calhoun the production of damage documents and
17 interrogatory responses. And then last, but not least, we'll
18 turn to our next steps in this proceeding.

19 All right. Here is what we're going to do with regards to
20 the discovery schedule in this matter, and it's important that
21 you keep these dates in mind as we work through other deadlines
22 on these other matters that I will be setting today.

23 First, with regards to the Brown matter, my recommendation
24 to Judge Koh is for a modest extension. I'm just looking for
25 my note here. I somehow dropped it. There we go. A modest

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1 extension of 60 days. And in Calhoun, a modest extension of
2 30 days. That will align the discovery cut-offs in the cases,
3 which I think will be helpful, particularly with regard to the
4 cross-use. However, that's not quite the end of it because if
5 you bump 60 and 30 days respectively, you end up right on top
6 of the holidays. So it's those days, plus a little more to get
7 us past. So discovery -- the recommended discovery cut-off in
8 this case to Judge Koh is now January 21st, 2022. January 21.
9 All right?

10 Again, I have made that proposal to Judge Koh I have
11 informed her she'll be getting a stipulation from the parties
12 reflecting that and you may address other dates.

13 MR. SCHAPIRO: And, Your Honor, just for
14 clarification, are you saying that these -- first of all, those
15 are fine with us.

16 Are you saying that these additions are for each date in
17 the calendar, or are you talking about just for the close of
18 discovery?

19 THE COURT: I'm just talking about the close of fact
20 discovery.

21 MR. SCHAPIRO: Perfect. Thank you.

22 THE COURT: That's the issue in front of me, and
23 that's the deadline that then we're working off of in terms of
24 not insubstantial production dates that are coming up as a
25 result of the follow-on disputes. All right?

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1 So that is the adjustment to the discovery schedule.

2 Turning to the matters to be referred to Special Master
3 Brush. I looked at the Brown dispute P14 regarding source
4 code. I will say that a review of the summary -- and it's
5 obviously not the first time I've seen this argument or at
6 least seen the issue -- but turning to the presentation in the
7 summary table, I did read through that.

8 I will note and, again, admonish both parties that the
9 summary table is not the place for legal argument, extended
10 legal argument. It is a place to identify issues and inform
11 the Court of the status of the dispute.

12 And I appreciate not all disputes are created equal, and
13 sometimes it takes a little bit more explanation. And I think
14 what was provided here in the initial, probably, initial
15 paragraphs in each side are fine. But when you find yourselves
16 inserting case cites and cutting and pasting from a draft brief
17 that you have ready to go you know you've gone too far.

18 In reading the summary and in looking at relevant law that
19 I'm familiar with, because this comes up not infrequently, I
20 would note that the fact -- the fact that Google does
21 something, that is collect data from the plaintiffs, and that
22 that fact is relevant -- what's the data, what do they do with
23 it -- doesn't necessarily mean that the actual source code,
24 that is, the actual, you know, the inner workings of how that
25 is done is relevant. Now, it may be, but certainly from the

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1 material that I've seen so far, I'm not convinced that it's
2 necessary.

3 Just because it exists and would say how it's done,
4 doesn't necessarily mean that that is relevant.

5 I think that this dispute follows naturally from the
6 ongoing dispute that the parties have currently before Special
7 Master Brush, which is the -- what data is collected and
8 retrieving that data, both as to the plaintiffs and as it
9 relates to class identification.

10 So it seems to me that whether or not source code is
11 needed, follows from that, unwinding those issues. And so that
12 this is properly and most efficiently referred to Special
13 Master Brush. And I have conferred with the special master and
14 he concurs. So that issue is moving before him. And he will
15 manage resolution of that dispute.

16 Second, turning to the Calhoun dispute regarding a
17 cleanroom, that's Dispute 1.13, it's not clear to me from the
18 description here, whether the plaintiffs is -- if this is an
19 issue about production of how data is produced, how data that
20 you've already received or is in the process of being produced,
21 how you are given access to it.

22 Or if it is, in fact, a request for other data. Perhaps
23 it is a back way around into a request for source code. I
24 don't know. I would like that clarification.

25 So who can address that for me for the Calhoun plaintiffs?

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1 MS. WEAVER: Good afternoon. Lesley Weaver of
2 Bleichmar Fonti, and I can address that for you today.

3 It's a good question, and maybe we can open the hearing
4 with some good news. We did have a very productive meet and
5 confer yesterday with Google on a topic that we hope, we
6 plaintiffs hope, relates to this issue.

7 To answer your question, we think what -- we still --
8 plaintiffs still do not know what data is collected. And our
9 access -- our request for access to a cleanroom here is to have
10 an expert look at the logs and look at the data and identify
11 the fields so that we, then, have the knowledge of what is
12 collected; and hopefully, we can tie this to a compromise on
13 the preservation log issue, which has been pending for so long.

14 So to answer your question, we are still in the dark about
15 what data is collected, where it is maintained, and how it is
16 used, although we have -- we've taken three 30(b) (6)s and we've
17 learned a lot. But, unfortunately, these threshold questions
18 have not been answered except for, for example, in -- and we do
19 wish to update the Court. Both Mr. Brush -- because we had an
20 August 2nd submission and then we had an August 4th deposition,
21 that was the third 30(b) (6). So we've learned more things. We
22 learned in that deposition some really interesting things. [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 But we didn't learn everything because the deponent was

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1 only instructed to provide us information about two of the
2 logs. Although Your Honor ordered Google to testify about all
3 the logs on March 5th, in all three depositions, the first two
4 deponents weren't able to discuss those logs. And here, this
5 deponent, was only invited to discuss two.

6 We are all exhausted. We all want to be constructive. So
7 we had this meet and confer yesterday and what plaintiffs are
8 proposing is that we simultaneously get access with our experts
9 and the engineers at Google who actually know this information;
10 not the 30(b) (6) deponents, but the people the deponents have
11 been talking to to get the information. And then we let our
12 experts sit down and look at the logs. And then we can
13 meaningfully have a meeting of the minds around: Hey, these
14 are the fields that the plaintiffs are really interested in.
15 They are in these logs, and this is a productive plan.

16 We're very mindful, Your Honor, of our September 2nd
17 deadline to move for class certification and we need that
18 classwide proof.

19 It's the first thing, Your Honor, asked us, I think, in
20 the second hearing. You said: Why do you need proof of the
21 other data, you've got so much in your complaint?

22 And we said: Your Honor, it's a class case, so we need to
23 be able to show, throughout the class period, what the pattern
24 and practice is.

25 We're willing to be reasonable and sample or use excerpts

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1 of the logs. We just learned on August 4th, finally, this
2 deponent could address for at least two of the logs, they can
3 [REDACTED] We want to continue on that progress.

4 So what we would ask is that we get access, what we would
5 ask, actually, is to give Your Honor a status report on Friday.

6 And we want to keep talking with Google. We each put in
7 five pages. Hopefully, we've got at least some areas of
8 compromise. When we were talking with Google yesterday, we
9 said: It might be we don't reach perfect agreement on all the
10 logs, but at least we can get somewhere. And if you give us
11 this access and let us talk to these engineers, then we can get
12 somewhere, and we can get a proposal before you. And maybe
13 even at next Friday's filing, we can give you a date when we
14 can get you a proposal.

15 That's at least what we're thinking, Your Honor.

16 THE COURT: All right. All right.

17 MR. SCHAPIRO: Your Honor, that's a lot to respond to
18 and --

19 THE COURT: I don't need the response to this
20 substance --

21 MR. SCHAPIRO: I thought. It sounded as if you were
22 getting ready to send this to Special Master Brush. And if you
23 are, then I won't respond point by point. We'll save it for
24 the special master.

25 I disagree with some of the factual statements from

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1 Ms. Weaver. I agree with her that we've made some progress in
2 discussions. And I'll hand it back to you, unless you want to
3 hear more from me.

4 **THE COURT:** I appreciate that, Mr. Schapiro.

5 I do intend to refer this question to the special master.
6 I am very pleased to hear that, excuse me, the parties did roll
7 up their sleeves and have, what sounds like, a constructive
8 discussion; not that anyone has conceded positions or is
9 necessarily agreeing to what the other is proposing; but it
10 sounds like it is a very specific and focused discussion, and
11 that there has been progress.

12 And that is what I need to see more of from everybody, and
13 both sides in both cases, which is, constructive progress. And
14 as you'll see as we work through these other issues, there has
15 clearly not been enough of that.

16 So, Ms. Weaver, yes. Good news. And that's always a good
17 place to start.

18 If the parties want to make a further submission, I'll let
19 you make that request to Special Master Brush, and he will
20 respond. He will manage this issue. So the issue of cleanroom
21 access in Calhoun is referred to Special Master Brush.

22 All right. Let's turn to the proposed cross-use issue.
23 Let me get my notes in order. It's always a little bit -- let
24 me just work through my pieces of paper here.

25 All right. So this was in the Calhoun -- came up in the

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1 Calhoun matter, but it is proposed as -- obviously, it's
2 cross-use for both Calhoun and Brown. I did receive a proposed
3 plaintiffs' order and a proposed Google order, and then a
4 redline. And it appears to me that the redline is the
5 plaintiffs' order, then with Google's adjustments, inserts, and
6 deletions noted in redline. And I just wanted to be sure that
7 I'm reading that correctly.

8 MS. TREBICKA: That's correct, Your Honor.

9 THE COURT: Okay. Excellent. Thank you.

10 All right. Then I am -- let's look at that then. That is
11 Docket 253-3. I think that that forms a -- there is a workable
12 format here. I have a couple of adjustments as follows:

13 And that is, on page 2. Let's see. That's paragraph 11,
14 referring to the definition of joint -- of "joint deposition."
15 The deletions there specifically requiring Google's
16 certification of substantial completion of discovery. I am
17 accepting that deletion.

18 You will see, throughout today's proceedings, impediments
19 to reaching the deadlines that I'm going to set on production.
20 With regards to it's here, Google's certification of
21 substantial completion. It's also -- we'll come to a request
22 in a moment that Google has that the plaintiffs have agreed on
23 something.

24 I'm taking those impediments out because I'm going to set
25 deadlines and those are going to drive this process.

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1 All right? We're not going to have any other interim
2 milestones to be touched on. You all are going to have to work
3 together, sleeves rolled up, with those deadlines in mind.

4 So paragraph I will read: Joint deposition refers to a
5 deposition taken simultaneously by counsel for plaintiffs in
6 both matters.

7 And it wasn't clear to me, do the parties have an
8 agreement on excluding 30(b)(6) or not excluding 30(b)(6)?

9 MS. WEAVER: Your Honor, Lesely Weaver.

10 We're excluding 30(b)(6) from this. It's for individual
11 capacity depositions.

12 THE COURT: All right. And, Google, does that comport
13 with your understanding?

14 MS. TREBICKA: Yes, Your Honor. That's something that
15 we have also agreed to.

16 THE COURT: All right.

17 MS. TREBICKA: In the name of compromise.

18 THE COURT: So then that deletion in its entirety is
19 adopted.

20 All right. Then I am accepting all of the changes until
21 we get over to paragraph 3, which is largely Google's proposal
22 on how to do this going forward.

23 And my question, Ms. Trebicka, probably for you, is I
24 think the proposal in paragraph 3 sounds reasonable, provided
25 that releasing documents to the vendor is the -- is the end of

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1 process. I mean, you release documents to the vendor and then
2 they're, you know, stamped, prepared for production, and they
3 are out the door.

4 MS. TREBICKA: Your Honor, so once we release the
5 documents to the vendor, there is some work that the vendor
6 needs to do to prevent errors. One we need -- the vendor needs
7 to Bates stamp. The vendor needs to make sure that the prior
8 Bates stamp off the same document also appears, so that
9 plaintiffs know what the cross-use document is.

10 So there is some -- they are moved to a different
11 database. So it's not going to be -- once we release, the
12 production will not be instantaneous.

13 THE COURT: I understand that. Let me -- my more
14 specific question is, it's not a situation where Google
15 releases documents to the vendor, all that magic happens, and
16 then they come back to Google for further review or evaluation
17 or something before production. Vendor is the last stop before
18 production.

19 MS. TREBICKA: Yes. I mean, it goes through outside
20 counsel because we send the production out by e-mail and
21 everything, but otherwise, yes, the vendor is the last
22 substantive step.

23 THE COURT: Okay.

24 MS. TREBICKA: Outside counsel, obviously, turns it
25 out in very short order.

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1 THE COURT: That's what I wanted to be sure, that we
2 were -- that this timeline is reflecting essentially the end of
3 or nearly the end of the production process, not the start.

4 MS. TREBICKA: Right.

5 THE COURT: That clarification -- thank you,
6 Ms. Trebicka. Then I accept the changes -- paragraph 3 will
7 read as edited in the redline.

8 MS. WEAVER: Your Honor, may I ask a point of
9 clarification on your previous ruling?

10 THE COURT: Yes.

11 MS. WEAVER: In paragraph 1, when we were looking at
12 the individual -- I may have just misheard you. It's 11,
13 "Joint deposition refers to a deposition, right now, taken
14 simultaneously by counsel for plaintiffs in both matters" -- I
15 apologize to the court reporter there for getting excited.

16 It seems to me that "of any deponent in his/her individual
17 capacity" should be included and not redlined, and that the
18 last sentence, "It should exclude depositions taken pursuant to
19 Federal Rule of Civil Procedure 30(b)(6)," should also be
20 included and not excluded. I'm guessing that was just an
21 oversight.

22 THE COURT: Correct, Ms. Weaver.

23 MS. WEAVER: Thank you. Sorry.

24 THE COURT: No, that's all right.

25 MS. WEAVER: Appreciate it.

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1 THE COURT: A little redline confusion there. So I'm
2 glad you caught that at the time. Let me just make a note here
3 as well.

4 Okay.

5 All right. Proposed paragraph 5. This, again, relates to
6 an impediment to production that the Court is rejecting. I
7 will not accept proposed paragraph 5.

8 This absolutely requires coordination between the
9 plaintiffs -- counsel for plaintiffs in both actions. I expect
10 that to happen in this case.

11 And if -- I think the example -- an example that came up
12 was the officer and director documents, and if there is a
13 compromise negotiated just, for example, on a set of documents
14 in the Brown case and then they are produced for cross-use, and
15 Google can make that clear, this is -- this is produced, this
16 reflects the compromise, if Calhoun wants to challenge that,
17 and somehow in the Calhoun case they -- you don't like it or
18 they think they are entitled to more, they can -- they can
19 raise that.

20 But, I have to say, if a compromise has been reached with
21 one group of plaintiffs, my presumption is going to be that
22 it's reasonable. Unless there is truly a unique fact in the
23 other case that requires something different, then I am going
24 with -- I'm going to go with the compromise.

25 So I want the parties to understand that there is a

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1 presumption of reasonableness of a compromise, and documents
2 will be produced pursuant to that. But I'm not going to
3 require any type of certification. Again, we're not going to
4 have any, "We're waiting, we would have produced, but we are
5 still waiting for a green light," because you're going to be
6 driving hard for the dates I'm going to set momentarily.

7 All right?

8 I hope that that is clear.

9 So paragraph 5, as proposed, will be deleted.

10 I believe the remaining changes that gets us over to
11 deposition coordination.

12 So, yes, I think plaintiffs' notice of deposition, other
13 plaintiffs can join it. That should be fine.

14 I think the treatment of -- I think attending the joint
15 depositions, as well as treatment of material in paragraph 11,
16 that looks fine.

17 What we're going to do about length of the deposition, I
18 had it noted in paragraph 11, but you actually addressed it
19 separately in paragraph 12. A joint deposition will be
20 10 hours. 10 hours.

21 And if the witness -- I mean, you get one deposition of
22 this witness. That deposition will be 10 hours on the record.
23 That's 10 hours of testimony. And if the witness wants to
24 break that over two days, then that is fine.

25 We all know, some witnesses are better just powering

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1 through it, and that's their preference. There are many
2 witnesses for whom that is an extraordinary amount of time to
3 be giving testimony. And I think it does -- it is likely to
4 impair the quality of the deposition.

5 So it's not who's taking the deposition, it's not their
6 call. All right? You should be prepared for your 10 hours.

7 But, it is the witness's call. And if the witness wants a
8 break, and continue it the next day, then that's -- that's
9 fine. But this is not an opportunity for a five-hour
10 deposition and then a month later another five-hour deposition.

11 That's -- there is one deposition. It can be 10 hours in
12 total. If the witness wants a break, the witness then the
13 witness gets a break to the next day. Okay.

14 Any questions. Ms. Trebicka?

15 MS. TREBICKA: Not on this provision, Your Honor.

16 THE COURT: Okay. Ms. Weaver?

17 MS. WEAVER: Yes, Your Honor. Are you finished with
18 the entire documents or are we looking at -- because the
19 issue --

20 THE COURT: That's a fair question. My question was
21 are we all clear on the deposition?

22 MS. WEAVER: Yes.

23 MS. TREBICKA: Your Honor, to clarify on the length of
24 the deposition, because I did have a question about
25 paragraphs 10 and 11 --

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1 THE COURT: Hm-hmm.

2 MS. TREBICKA: Which -- you said they sounded fine. I
3 wasn't sure whether that meant that they looked fine with
4 Google's revisions or without.

5 THE COURT: With the revisions.

6 MS. TREBICKA: Got it. Thank you.

7 THE COURT: As redlined. As redlined.

8 MS. TREBICKA: Okay.

9 THE COURT: I'm accepting the document as redlined,
10 except where I have noted.

11 And then discovery coordination among counsel. I think
12 that that looks fine.

13 All right? Any other questions?

14 Yes, Ms. Weaver?

15 MS. WEAVER: That is the issue I would like to
16 address, particularly in conjunction with your ruling that on
17 issues now, we need to be coordinating and making that clearer
18 for us.

19 We have been constrained -- the reason -- one reason -- I
20 think the big reason that we cannot reach agreement with Google
21 on this, although we all tried very hard, is that it's putting
22 plaintiffs in a difficult position to require coordination, and
23 then prohibit them from talking.

24 And so Google has actively enforced the protective orders
25 in this case by writing counsel e-mails asking: You did not

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1 disclose custodians to each other -- for example -- correct?

2 And then we're required to certify to Google's counsel
3 that we haven't talked about things.

4 If Brown and Calhoun, on the plaintiffs' side, can't talk
5 to each other, we're kind of ambushed in the selection of --

6 **THE COURT:** What's the fix that you're after? I don't
7 disagree, Ms. Weaver. I'm -- again, as I am making changes
8 through it, I may not appreciate the impact.

9 Tell me specifically where you're concerned.

10 **MS. WEAVER:** I think, in paragraph 14, I think we
11 should be allowed to discuss -- well, you know, anything that
12 could be where Google is going to seek coordination.

13 **THE COURT:** Right. But the changes didn't seem to
14 substantively change paragraph 14, so perhaps that's my
15 confusion.

16 **MS. WEAVER:** I agree. And I think maybe we didn't
17 address it here because I don't think we had perceived this to
18 be so broad.

19 And so, maybe, if I could ask, maybe the parties could
20 confer on an additional sentence, or we could discuss one here,
21 just to say: Counsel for the plaintiffs in the matter shall be
22 allowed to review and discuss any documents produced in either
23 matter in connection with good faith preparation.

24 I think that, you know, the second sentence there covers
25 it, in fact, that it's deemed privileged; but we don't want to

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1 be charged a violation of the protective order.

2 THE COURT: Understood. I got it.

3 MS. WEAVER: Okay. Thanks.

4 THE COURT: I got it. I got it.

5 Let's hear from Google on this.

6 MS. TREBICKA: Yes, Your Honor.

7 That's exactly -- what Ms. Weaver articulated is exactly
8 what this paragraph also says. It says that counsel shall be
9 allowed to review any documents produced in either matter in
10 connection with good faith preparation for any joint
11 deposition.

12 So I think that's covered. What we've --

13 THE COURT: I will add "and discuss." All right?

14 MS. WEAVER: Thank you.

15 THE COURT: And I think that that takes care of it.

16 Mr. Straite, did you need to be heard?

17 MR. STRAITE: Thank you, Your Honor.

18 I think your last sentence covered what I was going to
19 say. It's in line 12 of that paragraph 14, you see we had put
20 in that we may discuss the documents in connection with good
21 faith consideration of or preparation for.

22 If we just add in those three words "consideration of or,"
23 that will then cover plaintiffs' concerns. Because then we can
24 properly coordinate with Brown counsel and they can properly
25 coordinate with us, and we can share documents as we're

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1 considering possible candidates for deposition, rather than
2 just limiting it to preparation for previously agreed.
3 That's -- that'll fix -- those three words will fix everything.

4 THE COURT: Which three words specifically is that,
5 Mr. Straite?

6 MR. STRAITE: In line 12, the last three words,
7 "consideration of or," if we add those back in, I think that
8 covers everything.

9 THE COURT: I see.

10 All right.

11 MS. TREBICKA: May I address it, Your Honor?

12 THE COURT: Quickly, yes.

13 MS. TREBICKA: So we're talking about a very limited
14 universe of documents here. We're not talking about the
15 cross-use documents. Plaintiffs' counsel can already
16 coordinate and discuss the cross-use documents.

17 What this is only referring to is documents that have not
18 been produced in a case; and that's what we're trying to limit
19 here. We think that adding "consideration of preparation" just
20 broadens it too much.

21 THE COURT: I think it's fine. I'm going to allow it.

22 MS. TREBICKA: Okay.

23 THE COURT: Thank you, Mrs. Trebicka. I do hear
24 Google's objection, but we just can't slice the prosciutto that
25 thin. We've got to give plaintiffs an opportunity to have a

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1 discussion.

2 So -- and it may be that certain documents are just --
3 it's just not quite clear where they fall. And given the
4 massive, massive productions in this case, and those still to
5 come, something may be cross-use, but there may be something
6 related that didn't get stamped that way that at least the
7 parties they have to be able to have a discussion.

8 And I think the protective orders in this case provide
9 adequate protection to balance those concerns. The concerns
10 are legitimate. I think the protective order covers them.

11 Okay. We're going to move on.

12 MS. WEAVER: Your Honor, there is one remaining issue
13 that we briefed that we didn't quite catch in the redline.

14 THE COURT: What's that?

15 MS. WEAVER: Paragraph 7 and 8, Google wants to
16 produce in Calhoun, the Brown plaintiffs' discovery responses,
17 and in Brown, the Calhoun plaintiffs' discovery responses. And
18 the plaintiffs resist that.

19 THE COURT: And I'm going to allow it. I'm going to
20 allow it. I read that with that consideration. Thank you.

21 MS. WEAVER: All right.

22 THE COURT: Thank you. Turnabout is fair play.
23 Everybody pretty much gets to see everything.

24 Okay. Let's turn to the Brown ESI dispute. Perhaps it's
25 slightly inappropriately mislabeled as P1, when, in fact, it is

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1 a P1/P3 dispute, which exceeds the list; but not to worry, I
2 have dealt with it accordingly.

3 Okay. I have to say, this is an area -- first of all, let
4 me ask: Are there any updates? I'm working off of the
5 submission from August 2nd --

6 MR. RICHARDSON: Yes, Your Honor.

7 THE COURT: -- and I was, to put it mildly,
8 disappointed that there hadn't been more progress.

9 So Mr. Beko Richardson.

10 MR. RICHARDSON: Yes, Your Honor. There has been
11 progress. And, I guess, I'll start with the good news.

12 So we started with 35 additional custodians.

13 THE COURT: I'm sorry, Mr. Beko Richardson. I need
14 you to say your appearance, like, who you're speaking on behalf
15 of, again. That will help the court reporter.

16 MR. RICHARDSON: Yes, Your Honor. Beko Richardson on
17 behalf of the Brown plaintiffs.

18 And we did make progress with P1 on the issue of
19 custodians.

20 THE COURT: Okay.

21 MR. RICHARDSON: Based on our review of the
22 June 18th production, we identified 35 additional custodians.
23 We now have 19 in dispute. Google agreed to add eight, and we
24 agreed to drop eight; so the dispute is now over 19 individual
25 custodians.

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1 THE COURT: So you're at how many total custodians in
2 that case right now?

3 MR. RICHARDSON: So we are currently at 29 custodians
4 that Google has agreed to and 19 in dispute.

5 THE COURT: Okay. Well, that's where it was left.
6 There were 29. At least that's what my records reflect. Or am
7 I --

8 MR. RICHARDSON: Correct. Google has not agreed to
9 add any additional custodians. We agreed, as an effort to
10 compromise, to drop eight of our requested custodians, leaving
11 19 in dispute.

12 THE COURT: The parties have agreed on 29; correct?

13 MR. RICHARDSON: Correct, Your Honor.

14 THE COURT: Okay. And, from Google, is that correct?

15 MS. CRAWFORD: That's correct, Your Honor. 29
16 custodians.

17 THE COURT: All right. So here is what really
18 concerned me in looking at this case, this particular dispute
19 in Brown.

20 First, that I gave the parties pretty clear direction when
21 we addressed this back in June, where I was prepared to set
22 hard limits on custodians and deadlines for terms. The parties
23 had made some progress, but I went back and looked at my order
24 on your ESI dispute from that time, and I think that the
25 direction was pretty clear.

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1 I was very concerned to see the scope of the dispute that
2 was still open before me. I'm glad there has been some
3 progress, but not enough; particularly with regards to the
4 plaintiffs' request for an additional or wanting a cap of 60
5 custodians, when I have signaled all along that that is
6 excessive. And I think it had gone from 50 to 60. So we had
7 this movement in the wrong direction.

8 And I appreciate that the defendants are getting documents
9 and reviewing documents, and that's what's behind this. But
10 this is not a case -- it does not show enough discretion and
11 discipline to see those numbers expanding that way.

12 Now, it sounds like, again, there has been some progress.
13 So we're at 29. There are 19 in dispute. And I'm going to cap
14 custodians at 42. 42. All right? That's how many custodians
15 there will be.

16 And, Mr. Richardson, the deadline for Brown -- let me get
17 my dates here to identify. So it will be 42 custodians. Those
18 will be identified by August 23rd. Identified by August 23rd.

19 In the meantime, and you don't have to take all that time,
20 obviously, if you can make that selection sooner, but not
21 waiting -- not waiting for finalization of the custodian list,
22 but the parties need to get underway on completing their meet
23 and confers as to the terms, as to the search terms.

24 I appreciate Google's argument that: No. No. We have to
25 take this first. We need to know who the custodians are, then

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1 we can constructively address the terms in toto.

2 No. We're going to move forward. And those terms will be
3 agreed to on August 30th. No later than August 30th. That
4 means sleeves rolled up, in a room, and Google and the Brown
5 plaintiffs hammering it out as to the 42 custodians. Those
6 that -- again, terms are -- terms are still being negotiated
7 for -- that that gets done. That will be done by August 30th.

8 MR. RICHARDSON: Your Honor, this is Beko Richardson
9 again.

10 If I can give a little bit more good news on the search
11 term front, we were able to hammer out an agreement this
12 morning that resolved all of our disputes regarding the
13 existing 17 custodians as to the additional search terms.

14 THE COURT: Okay.

15 MR. RICHARDSON: I think that if we're able to reach
16 an agreement on the additional custodians, the additional
17 search terms should not be an issue.

18 THE COURT: Good. That is good news indeed.

19 If there is a dispute, then on August 31st, you can send
20 me -- you can make a joint submission to me that has --
21 you know, identifies by custodian the agreed terms, the
22 plaintiffs' disputed terms, that is the terms they want that
23 the parties can't reach agreements, with hit counts. And then
24 Google's position, either -- you know, it's either a
25 compromise, modify the term this way, or Google's position is,

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1 you know, this term is too -- either too broad or it has a
2 syntax problem. But, you know, identify Google's position --
3 all right -- as to the terms in dispute. That's all I want.

4 So it's a very functional, custodian name, here -- here
5 are Jane Doe's -- here are the agreed terms, here are the
6 disputed terms with hit counts, and here is Google's position
7 on those.

8 And that list had better not have 19 custodians on it.

9 All right? 19. I didn't give you 19. Better not have the
10 next, you know, 13 or however many that we're still in -- we
11 have a ways to go, if they only agreed to the first 17, but you
12 will get there. All right?

13 I'm glad you've made progress. Let's capitalize on that
14 momentum. Get the terms shut down. All right?

15 If not, give me that submission on the 31st, but as you
16 can see, I'll just deal with it in terms of a blunt instrument.
17 So I think you want to try to negotiate.

18 MR. RICHARDSON: Understood, Your Honor. Thank you.

19 MS. CRAWFORD: Thank you.

20 THE COURT: Production deadlines. Google, productions
21 will be completed. All right? This is in both cases and this
22 actually goes for the plaintiffs as well, we will come to that
23 a little bit later in today's discussion.

24 Deadline for production of documents is September 30th.

25 Documents will be produced September 30th. And the reason for

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1 that, here is the thinking behind it -- and I appreciate this
2 is going to, obviously, require a change in the culture of
3 production by Google, but it's got to happen and it's got to
4 happen now.

5 That gives the plaintiffs the October time frame to
6 review -- assimilate and review documents. And it leaves you
7 all November and the workable part of December for depositions.
8 You've got a little bit of overflow time after the first of the
9 year, but not much.

10 All right?

11 That's tight. That I understand, but this is the time
12 we're doing it. The pace in this case and in Calhoun, from
13 both sides, has been too slow. And we've got some -- and I
14 appreciate, it's complicated and there is a lot of -- a lot of
15 material here.

16 And I have weighed carefully the plaintiffs'
17 responsibilities to limit and focus their demands where
18 appropriate, and Google's responsibility to be forthcoming with
19 relevant and responsive documents.

20 So that's the -- that's the time frame we are working off
21 of, and you'll see that it flows throughout the remaining
22 decisions.

23 **MR. SCHAPIRO:** Your Honor, I hear what you say when
24 you say that you have weighed carefully the burden and what you
25 expect. I, nevertheless, want to take a run at this because it

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1 would not be fair to the team or even to the Court to be
2 promising things that I think, as a practical matter, are not
3 possible.

4 If we have -- if I understood your prior order a moment
5 ago -- and on some of this I can defer to Ms. Crawford who
6 understands the day-to-day of it. But if your prior order is
7 that terms are to be agreed on August 30th, completing a
8 document production by September 30th, especially a document
9 production that's not riddled with error, is just not possible.

10 I think Ms. Crawford can, maybe, give a sense of the steps
11 that have to happen and the numbers involved --

12 **THE COURT:** I'm well aware of the steps because we
13 have been through it before. But what it requires is running
14 the terms against the custodians, and those hit documents go to
15 the vendors for production. And review and screen -- I mean
16 that's what I meant. Google will have to change its culture of
17 production and that will -- you know, you have all rights
18 reserved; there is no waiver of privileges; we have robust
19 protective orders. But that is what we are up against, and the
20 parties have created this.

21 The parties have created this. Everyone has known that
22 the day will come when productions have to be out the door.

23 I can shorten -- I can shorten. I will hear a request.
24 I'll hear from you and Mr. Richardson on tightening the time on
25 identification of terms. But I'm trying to allow the parties

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1 enough room to negotiate that on the front end, and it just has
2 to happen. It has to happen.

3 MR. SCHAPIRO: So, yes, I think we would take you up
4 on that, to shorten the amount of time at the front end here on
5 the terms. And I would, nevertheless, ask if maybe you could
6 see your way to it adding an extra week to that process.

7 Because, of course, it's not just -- you run the hit count
8 and maybe you get -- so you run the terms and maybe you get
9 100,000 documents from someone. They then need to be reviewed
10 for are they responsive to any document request and for
11 privilege before even being sent to the vendor. So you don't,
12 obviously, just send 80,000 from one custodian to a vendor --

13 THE COURT: That's where Google will have to adjust
14 and address the process. And, you know, you have to go to
15 spot-reviewing for relevance and responsiveness; what are the
16 terms returning? You can do that pretty quickly.

17 And the plaintiffs bear the burden; right? If they are
18 not focused, they have more than they can manage before
19 depositions get started. But they have to manage that on the
20 front end with their focused requests. But to a certain extent
21 the burden is on them.

22 MR. SCHAPIRO: So can we push that August 30th, let's
23 say to August 23rd, and can I get a few days past
24 September 30th so I'm not tarred and feathered by the team and
25 the client?

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1 THE COURT: Mr. Richardson?

2 MR. RICHARDSON: Your Honor, we have no objection to
3 August 23rd for a joint submission and we're happy to try and
4 make the proposal tomorrow, if possible, and try and resolve
5 this even before then.

6 THE COURT: Okay.

7 Ms. Crawford?

8 MS. CRAWFORD: If I may be heard, Your Honor. The
9 issue that I foresee is one as is it relates to the
10 identification of new custodians who --

11 THE COURT: Hang on one second, Ms. Crawford. I want
12 to be sure that the court reporter can hear you okay. Your
13 voice is a little muffled.

14 MS. CRAWFORD: Is this any better?

15 THE COURT: That is better. So be as close to the
16 microphone and speak slowly.

17 MS. CRAWFORD: Absolutely.

18 As it relates to the August deadline that has been set for
19 the 42 -- the identification of the 42, the full list of 42
20 custodians, in the event that plaintiffs proposed a custodian
21 who's not yet been discussed between the parties, there are a
22 number of steps that must be taken to collect data, process
23 data, for those individuals that may require additional time
24 due to this process that we're contemplating.

25 For custodial data that's already capable of being tested

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1 using the search terms, we will make best efforts, Your Honor,
2 to comply with that timeline that's been proscribed. But if we
3 don't have the data, there is sort of a one- to two-week
4 turnaround before we even have the ability to test terms for a
5 new custodian that has not been discussed between the parties.

6 So I just want to, one, let the Court know that this is an
7 additional wrinkle; and, two, ask that it be factored into the
8 dates and the deadlines that we're discussing.

9 **THE COURT:** I appreciate that, Ms. Crawford.

10 I am not unfamiliar with the process, and I know that
11 would be difficult. And the plaintiffs should be keeping that
12 in mind. I've given them a pretty short leash in terms of
13 additive custodians. So I -- well, Mr. Richardson?

14 **MR. RICHARDSON:** Your Honor, we will select the 13
15 from the 19. There won't be any surprises. We will get this
16 done.

17 **THE COURT:** Okay. Then I will, pursuant to Google's
18 request, will set the deadline for the 23rd for final
19 identification of the 42 and search terms. But that requires
20 the parties to meet and confer, and that is next week.
21 All right? That is, let's get these terms done and agreed to,
22 and this submission to me. If there is any dispute, you can
23 make that submission on the 24th. Okay?

24 Obviously -- and, you know, the submission to me is the
25 result of the meet and confer efforts. It's not the start of

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1 meet and confer. But it sounds like you all have -- you've
2 been paying attention to this. So that's good.

3 MR. RICHARDSON: Your Honor, just to clarify. With
4 those modifications, does that mean that the September 30th
5 date will hold?

6 THE COURT: Well, that's just what I'm looking at. I
7 did consider a very early October date. Perhaps October sounds
8 better to Google than September. It's only a matter of a few
9 days, Mr. Richardson.

10 MR. RICHARDSON: I would defer to the Court.

11 And yet I would just note that we are still awaiting a
12 privilege log in connection with the production on June 18th.
13 So even if there is a September 30th deadline, I think we're
14 still going to be working through document issues for some
15 number of weeks afterwards. So I'm reluctant to agree to
16 anything that prolongs this. I think September 30th is
17 appropriate. But if Your Honor wishes to push that into
18 October, we have no objection.

19 THE COURT: My concern with pushing the date is the
20 practical reality of getting depositions scheduled in November
21 and December. It can be hard to wrangle deponents. I'm not
22 worried about counsel; I know that they'll be there, but it can
23 be difficult to manage deponents. So that's -- that is, in
24 part, what's driving that deadline.

25 MR. RICHARDSON: Yeah. On that issue, I would just

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1 add that the last time, you know, we had hoped for more of a
2 rolling production, but it was one large production on
3 June 18th, with some smaller productions before. So I would
4 expect a large production on June -- on September 30th that
5 would take us some time to get through, and then notice
6 depositions, and proceed with those depositions. So I would
7 submit that September 30th is appropriate.

8 **THE COURT:** Okay. Here's what I'll do. I'll extend
9 the deadline to October 6th. October 6th. All right? That's
10 seven days.

11 October 6th will be the deadline for production, and this
12 will be a rolling production. And I appreciate, you know,
13 we're under the gun and there is a lot of steps that have to
14 happen.

15 Mr. Schapiro, we lost you.

16 He should be back. There he is.

17 So October 6th -- if you missed that, Mr. Schapiro,
18 October 6th is the deadline that spares the tarring and
19 feathering, but I'm confident that these teams can and will
20 work together. We'll get that done. You will get that done.

21 **MR. SCHAPIRO:** Thank you, Judge.

22 **THE COURT:** But there will be a rolling production. I
23 want to make that very clear. To the extent, again, the
24 documents are out from the vendor, then they get in the
25 database and they get produced.

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1 Pardon me.

2 MR. SCHAPIRO: Thank you, Your Honor.

3 THE COURT: All right. We're going to -- we still
4 have a lot of ground to cover, and we've made good progress.
5 I'll tell you what, we will just address the Brown issue on the
6 Google depositions and then we're going to take a short break
7 for the court reporter, and then we'll return to the Calhoun
8 specific issues.

9 So this is P17. Let me get my notes for that.

10 And let me just ask, is there a -- this is a dispute about
11 the timing and number of Google depositions. And the parties
12 have had some difficulty and they're back and forth in
13 scheduling and getting back to each other.

14 Has there been any progress on this since August 2nd,
15 since the submission to me?

16 MS. BONN: This is Amanda Bonn for the Brown
17 plaintiffs, Your Honor.

18 Unfortunately, I don't think there has been much progress
19 made. That said, I think that Your Honor's guidance on the
20 numbers of custodians, obviously, you know, crosses over into
21 depositions.

22 You know, our two concerns are, 10 is just not enough; and
23 number two, we need to have some reasonable process for getting
24 things on calendar. We can't have three months go by from a
25 notice to a deponent sitting.

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1 THE COURT: All right. We'll work. I think that the
2 plaintiffs' proposal for timing, which is to provide dates for
3 a deponent within a week of getting the notice, and then to
4 offer dates that are then within five weeks of that notice is
5 reasonable. I will also require the plaintiffs to confirm
6 dates in 48 hours.

7 Is there already an agreement for this protocol in place
8 in Calhoun?

9 MS. TREBICKA: There is not, Your Honor.

10 THE COURT: Okay. Then we're going to use the same
11 process in Calhoun. Okay? We're going to use the same
12 schedule, that will make it clear for everyone in both Calhoun
13 and Brown.

14 The protocol for getting noticed will be as proposed by
15 plaintiffs. That's on page 28 of the Brown summary chart, with
16 the addition of confirmation of the date coming back from
17 plaintiffs -- or coming back from the producing party within
18 48 hours.

19 All right. You all are going to be managing.

20 With regards to number of depositions, same question, has
21 that been addressed in Calhoun?

22 MS. WEAVER: It has not, Your Honor.

23 THE COURT: Okay. Then that is ripe as well.

24 I'm going to allow, in each Brown and Calhoun, I will
25 allow a total of 20 depositions. 20 depositions. All right?

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1 That will include -- that includes joint depositions, that
2 includes 30(b) (6) depositions, not the ones I previously have
3 ordered around the database issue because I ordered those
4 early, and I believe I indicated those would not count against
5 the limits.

6 But that's -- that will be the limit for the number of
7 depositions. All right?

8 If a plaintiff believes that the sun, stars, moon must
9 move for an additional deposition, you can make that request to
10 the Court. I'm just going to tell you right now, one, it will
11 be a good cause showing. And I'm very unlikely to allow,
12 you know, any more than a couple of additional depositions.

13 So this is not -- it's not an open door to start with 20
14 and see where you are. This is, you should be working with 20
15 as the limit, and if you end up with a -- you know, a name or
16 two that you believe you have to have, you may come to
17 the Court and seek that. I'll hear from both sides.

18 **MS. BONN:** Your Honor, could I ask for clarification
19 on just a couple of questions?

20 **THE COURT:** Of course.

21 **MS. BONN:** One is I understood Your Honor to be saying
22 20 depositions per case. And a joint deposition would count as
23 a depo against each case?

24 **THE COURT:** Right.

25 **MS. BONN:** And then the second question I had is, you

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1 know, if we serve a 30(b) (6) notice in the Brown case and
2 Google designates six different witnesses on different topics,
3 we have very little control over how many witnesses they choose
4 to designate. And so can we get some guidance on how to deal
5 with how we count 30(b) (6) depositions? Is it one notice
6 counts as one depo against the limit?

7 THE COURT: Well, again, I expect the parties to work
8 that out. I don't want gamesmanship where a party notices a
9 bunch of people to try to use up the depo count. I also don't
10 want notices that are, you know, far and wide categories that
11 aren't necessarily related. All right?

12 MS. BONN: Understood. Thank you.

13 THE COURT: So a 30(b) (6) notice that has, you know,
14 all related topics, if there need to be multiple witnesses then
15 that's going to be one witness on that notice. But if that
16 notice has far-reaching topics, then those are going to be
17 separate -- you know, separate and individual, and they will
18 count separately.

19 MS. BONN: Understood.

20 MS. TREBICKA: Your Honor --

21 THE COURT: I think the parties all get it. You're
22 all very experienced with this. And if you can't, you can
23 submit the notice and the number of depos to me. I'll call it.
24 But you really -- I don't think you -- I don't think that will
25 satisfy either side, let's put it that way.

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1 MS. TREBICKA: Your Honor, may Google suggest
2 something?

3 How about it be measured by hours? Every seven hours is a
4 deposition for a 30(b) (6) notice. It's just because I can
5 foresee how there may be disagreements in the future over are
6 these really related topics, do they go over into another
7 topic?

8 THE COURT: I appreciate that suggestion,
9 Ms. Trebicka. I always preferred, as a litigant, and often
10 judges also prefer, using hours instead of -- instead of
11 numbers. And I think perhaps for managing the 30(b) (6)
12 depositions, that may be a good way to go. I think that that's
13 probably a good idea.

14 Ms. Bonn?

15 MS. BONN: I tend to agree with that, Your Honor. I
16 just think it's more of a bright-line rule and it will avoid
17 disputes.

18 THE COURT: Which is music to my ears, Ms. Weaver.

19 MS. WEAVER: I agree.

20 THE COURT: Mr. Mao?

21 MR. MAO: Your Honor, this is Mr. Mao for the
22 plaintiffs in Brown.

23 Just a quick point of clarification, because of one your
24 prior rulings, Judge, which is that you indicated that on a
25 joint deposition, it would be a total of 10 hours. So I just

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1 want to make sure that, insofar as Ms. Trebicka is talking
2 about a seven-hour count, that does not apply to any in which
3 we actually choose to put into the 20, by way of a joint
4 deposition, and those instead will be a 10-hour, in order for
5 that to count against each of our individual 20s.

6 THE COURT: Right. So Ms. Trebicka's suggestion as to
7 30(b) (6) depositions, that we count each seven hours as a -- as
8 one deposition. And I think we all agree that's a nice
9 bright-line rule.

10 I believe, you're addressing the situation, Mr. Mao, if
11 it's a joint 30(b) (6); is that -- is that what you're asking?

12 MR. MAO: Actually, Your Honor, I haven't thought
13 about that. I was just making sure, because your initial --
14 Ms. Trebicka's initial statement sounded like it was
15 encompassing all depositions. And in order to avoid further,
16 you know, conflict on this, I just wanted to make sure that the
17 10 hours for individual joint depositions would not count
18 against -- would not, you know, somehow end up as a seven-hour
19 deposition instead.

20 THE COURT: I think the parties can navigate their way
21 through that. And I would expect you would be able to address
22 a joint 30(b) (6), ten-hour deposition as well. All right?

23 MS. TREBICKA: Agreed.

24 THE COURT: Okay. I expect everyone to be reasonable
25 and manage these. But thank you for requesting the

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1 clarification, Mr. Mao. I want to be sure that is clear.

2 All right?

3 Okay. Now, let's take a break for the court reporter.

4 Let's take we'll take a ten-minute recess, and then we will
5 reconvene and move to the Calhoun matters and next steps.

6 All right? Please be back 10 minutes. Thank you.

7 (Recess taken at 10:40 a.m.)

8 (Proceedings resumed at 10:50 a.m.)

9 THE CLERK: Court is back in session.

10 THE COURT: All right. We have Ms. Ekhaus? We do.

11 All right. Then we are ready to go.

12 All right. Turning to the Calhoun ESI dispute, this is
13 from the parties' submission on July 23rd, Docket 251. This
14 was a specially-ordered submission. I understand the parties
15 are still disputing ESI search terms.

16 Has there been any progress on this front?

17 Who's got the mic for Calhoun on this, please?

18 MR. STRAITE: Your Honor, this is David Straite for
19 plaintiffs.

20 We did confer yesterday with the Calhoun team -- I'm sorry
21 with the Google team, and invited further conversations on
22 this. We have not had further discussions this morning;
23 however, we did hear Your Honor's rulings on other matters, and
24 hearing you loud and clear on tone, et cetera, would it be
25 helpful to Your Honor if the parties met and conferred again

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1 tomorrow and Monday and got you what we hope would be further
2 revisions on Tuesday?

3 I have not run this by Google's counsel. We are just
4 thinking, in light of what you ruled earlier today, we're
5 hearing you.

6 THE COURT: All right. Okay. Let me ask a clarifying
7 question for myself. I appreciate that proposal, Mr. Straite.
8 I'll hear from Google, if they think that might be productive
9 or not.

10 But as I understand, the dispute is over -- there're 23
11 terms in dispute, 23 search terms. The chart, Exhibit A, has
12 48 terms on it. So what are the disputed terms, or am I
13 misreading the chart?

14 MR. STRAITE: Yes, Your Honor, you are misreading the
15 chart. Because the numbers are -- we preserved the original
16 numbers. So if you see Chart 1, 2, 3, 4, 5, 6, and there is no
17 7, and there are others that are missing. So the actual number
18 is 23, even though the numbering retained the original numbers.
19 For clarity, we retained the original numbers.

20 THE COURT: Got it. Silly me. I looked at the last
21 page and the last number. I did not actually go through and
22 count them all by hand.

23 MR. STRAITE: That falls on Jomaire and David. We
24 apologize.

25 THE COURT: Well, that certainly clears up that

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1 question.

2 Okay. These are the terms in dispute. We're at 1.3 --
3 call it 1.4 million unique hits.

4 If the parties want to meet and confer further, but tell
5 me where you think we are, or would that be beneficial.

6 Ms. Crawford?

7 **MS. CRAWFORD:** Well, I think Mr. Straite's comments,
8 his invitation to further meet and confer, we've remained
9 willing to meet and confer. We put a proposal in our joint
10 submission suggesting that a cap of 350,000 document hits is
11 appropriate, and can be reviewed in the amount of time that we
12 have to complete fact discovery; especially in light of the
13 extensions that your Court has just ordered.

14 If they -- if plaintiffs believe it would be beneficial
15 for us to meet and confer tomorrow, we remain willing to do so.
16 We've proposed a number of suggestions to the terms in order to
17 cut down the universe. So we're hoping that that input and
18 feedback we've given over time will ensure a fruitful
19 discussion.

20 **THE COURT:** Okay.

21 **MR. STRAITE:** And, Your Honor, further to that
22 optimistic view, there are three additional things that, maybe,
23 also will help us move to resolution.

24 As we noted in the submission and to Your Honor in the
25 last hearing, the 1.4 million unique hits, that is a

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1 duplicative number. The de-duplication here that Google is
2 using doesn't happen until after the search terms are agreed.

3 We spoke with our ESI experts and we know that the
4 de-duplication could, if we chose to, could be done prior to
5 the hit count.

6 So, if it's possible with Google's litigation platform, it
7 would be helpful to see the de-duplicated number, and get that
8 1.4 million down to a more realistic number, just from that
9 alone.

10 Number two, it will be helpful to know if there are
11 specific search terms that Google is disputing on burdens
12 grounds. So far we've gotten an aggregate objection --

13 **THE COURT:** You're going a little fast there,
14 Mr. Straite.

15 If there is a specific ground that Google is?

16 **MR. STRAITE:** So if there are objections that Google
17 has to specific ESI terms. So far we've gotten objections to
18 the aggregate number. So we're hearing that 1.4 million unique
19 hits is too big a number in the aggregate.

20 What may be useful is if we can focus on a
21 search-term-by-search-term burdens argument. So if there are
22 two or three that are constituting the real bulk of their
23 objections, but there are other search terms that we can agree
24 to, we're not yet hearing from Google a term-by-term argument.
25 We're talking about the aggregate number, and that's proving to

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1 be an obstacle to resolution.

2 THE COURT: All right.

3 MS. CRAWFORD: If I may respond, Your Honor. What we
4 did in combing through all of the disputed search terms is
5 that -- well, first disputed and undisputed. We accepted a
6 number of undisputed --

7 THE COURT: Yeah. We're past that. We got that.

8 MS. CRAWFORD: -- where we did not have burden
9 arguments. And so the remainder of the terms that appear in
10 the chart that was attached to the joint submission represent
11 the terms for which we believe there is a significant burden
12 associated with running them.

13 And there are footnotes explaining why each of the terms
14 and the counts associated with them reflect the arguments that
15 we've made.

16 THE COURT: Okay. I appreciate that.

17 I think that both parties are mindful, particularly with
18 regards to the deadlines. Plaintiffs need to be seeking and
19 retrieving a manageable universe of documents; however, I do
20 not think that a proposal of 350,000, a cap, an arbitrary cap,
21 is appropriate.

22 So let me put that out there so that the parties can meet
23 and confer constructively. It would really be around the
24 terms.

25 Ms. Crawford, I don't know how quickly, if Google's

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1 platform or how quickly you could produce a de-duplication hit
2 count number. I've never understood it to be that facile of a
3 process, but the technology, I'm quite sure, has moved
4 beyond -- has kept improving while I've been on the bench.

5 So that may be helpful. I'm just going to give the
6 parties some guidelines. That may be helpful.

7 I'm not inclined to set an arbitrary cap. There could be,
8 you know, all of the hits could be responsive. And reflect
9 communications on the very issues keyed in this dispute. And
10 if all of those were responsive, they would all have to be
11 produced.

12 But, it doesn't sound like the plaintiffs are quite there
13 yet. And, frankly, I don't see that yet in the terms here.
14 But I do see a lot of effort in these terms and an effort to
15 focus and circumscribe searches. I think the parties can
16 continue to do a little better.

17 But in light of the deadlines, I can't give you too much
18 time. So roll up your sleeves. Have a meet and confer. You
19 may resubmit the chart to me on Monday. You know, with
20 whatever the remaining terms in dispute are. And if there is
21 additional or more refined hit count information, great.

22 And I'll make a call.

23 MR. STRAITE: Thank you, Your Honor.

24 THE COURT: Ms. Crawford?

25 MS. CRAWFORD: I think -- I just want to preface that

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1 hit counts do take some time. So we'll meet and confer
2 tomorrow. We'll make sure that folks are on stand-by over the
3 weekend to turn those counts around.

4 And if we need to have a further conversation on Monday
5 before the submission goes in, if one needs to go in, then we
6 will certainly do that.

7 We've provided a lot of guidance as for how these terms
8 can be narrowed. And I'll also share with counsel for Calhoun
9 what we've been able to do in the Brown action in order to
10 resolve a lot of the search term disputes without resort to
11 further intervention by Your Honor. And so, hopefully, we can
12 report more favorable progress on Monday.

13 THE COURT: Okay. All right.

14 I'm all for giving the parties an opportunity to make
15 this -- the production more manageable. The production
16 deadlines will remain, of October 6th. So that will need to
17 be -- need to be managed, and that's going to require
18 management on both sides.

19 So -- all right. I'll defer to Monday.

20 And if you reach agreement and there is no further
21 submission, please let me know that as well.

22 MR. STRAITE: Thank you, Your Honor.

23 MS. CRAWFORD: Thank you.

24 THE COURT: All right. The dispute regarding the
25 production of damage-related documents from the plaintiffs to

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1 Google. This is Dispute 2.7. And I did review that and I --
2 let me just find my notes here. I seem to have moved the wrong
3 page.

4 Yes. So let me just -- as I understood the Calhoun
5 plaintiffs' position, it was that they were looking for
6 documents; if they have responsive documents, they will produce
7 them. And perhaps the production deadline now informs this
8 decision.

9 But just as Google must engage in a rolling production, so
10 must the plaintiffs. So if these documents have been
11 identified, they need to be produced well in advance of the
12 deadline, in any event, to the extent they exist -- pardon my
13 cup of water in the screen. To the extent they exist, the
14 production will be completed by -- I'm sorry, I said September
15 30th -- by October 6th. By October 6th. All right?

16 MS. WEAVER: Understood, Your Honor.

17 The only point of clarification that I could give is that
18 this particular topic is an example of asymmetry of
19 information. And we when get what Google has on the
20 plaintiffs -- and I can give you a concrete example -- it may
21 be that we then realize is something this relevant.

22 Here is the example: We received from Google documents
23 relating to a given client's [REDACTED]. We, as the lawyers,
24 weren't even aware of that issue. We do think it directly
25 impacts privacy. Maybe we would want to go back to the

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1 plaintiff and say: Okay. This is now relevant in the case.

2 But other than that, we have produced what we have. We
3 are actively seeking. We understand our obligations and we
4 will comply with them.

5 THE COURT: All right. And that's what the order will
6 reflect. To the extent --

7 MS. FANI: Your Honor, if I could just clarify one
8 thing. To the extent that plaintiffs seek to rely on any of
9 these documents in their motion for class certification, we ask
10 that they either provide the documents in advance of the
11 September 2nd deadline for that motion, or that they provide
12 some notice that no such documents exist by that date.

13 THE COURT: Well, if they need it for class cert,
14 you'll see them. Right? I mean, if they are relying on them,
15 you will see them. They will not be pointing to documents that
16 have not been produced, because they will do that by
17 identifying a specific Bates number.

18 So I think that that -- that addresses that issue. And I
19 would expect nothing less.

20 With regards to the response to Interrogatory Number 7,
21 Dispute 2.12, I appreciate the parties are arguing about,
22 ultimately, what's relevant or what -- what facts remain
23 relevant to the unlawful competition claims. But, at this
24 point in discovery, ultimately, that would be an issue for
25 Judge Koh at trial. At this point in discovery, the request is

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1 proper and needs to be responded to.

2 The plaintiffs will identify with some specificity, not
3 just pointing to the large pile of Google catalogs, what
4 they -- what statements by Google constitute the
5 representations, where they -- where it exists, and if --
6 plaintiffs will answer the question did they review it.

7 The answer, understandably, may be, "I don't remember,"
8 but the question will be answered.

9 And then the ultimate dispute over relevance of this
10 information will be an issue for Judge Koh. But at this stage,
11 it is relevant and proportional to the matter, and it will be
12 answered.

13 So plaintiffs will answer Interrogatory 7. The Calhoun
14 plaintiffs will answer Interrogatory Number 7, and you'll do
15 that and provide those verified responses in two weeks, by
16 August 26th, two weeks.

17 All right. Those are all of the disputes. Those are the
18 priority disputes that the parties had identified. Those are
19 the disputes that I had an opportunity to work through.

20 I did not parse through the summary charts to identify
21 additional disputes. I am confident they are there. I am
22 hopeful that today's directives give the parties direction.
23 And that those can be resolved.

24 I also appreciate -- I do limit the parties because,
25 frankly, that's just all the time I have to get through. These

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1 issues are complicated and it takes a fair amount of court time
2 which is -- which is fine. That's why I'm here.

3 If there are remaining disputes in the submission of
4 August 2nd, in either Brown or Calhoun, that a party feels need
5 to be addressed at this time, and there may well be, then each
6 side in each of the cases, can identify -- can identify three
7 additional disputes that you think the Court needs to pay
8 attention to at this time. And you can submit those to me,
9 identify those, and it's just a list, tomorrow. All right? By
10 close of business tomorrow.

11 So Calhoun plaintiffs, you can pick three more. Google,
12 you can pick three more in that case. You don't have to pick
13 three. It's okay. You can defer -- decide to defer some. You
14 can, in light of today's discussions, determine perhaps some
15 more meet and confer, or maybe we don't want to try the Court's
16 patience with this issue. And that's fine. You're not --
17 they're not forever waived. You're just not putting them on
18 the list for my attention.

19 Same goes in Brown. You can identify -- the Brown
20 plaintiffs you can identify three; Google can identify three.
21 But let me just be clear: These are going in my discovery
22 queue. On August 2nd when I had rolled off of crim duty and
23 came to pay attention to the discovery queue, your August 2nd
24 submissions were disputes 12 and 13, respectively. 12 and 13.

25 So I did my best. As you well know, you're not the only

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1 case and not the only discovery cats to be herded. And, I
2 mean, that with all, you know, respect and sincerity.

3 So I think our next timing for our next group session, if
4 you will, I'll -- let's set that for September 30th since that
5 day is now available because Google is not pushing documents
6 out the door. September 30th, 9:30 a.m. 9:30 a.m. I'll
7 take -- let's be realistic. I'll take submission from the
8 parties, two issues each side, two for plaintiffs in each case,
9 two for Google.

10 On the -- I've got some other commitments that preceding
11 week. I'll take them by noon on the 24th. Noon on the 24th.
12 And I will do my best to get through those disputes and be
13 prepared for a further session on the 30th.

14 MS. BONN: Your Honor, I had one request for
15 clarification.

16 I think Google and the Brown plaintiffs both were hoping
17 for some clarification. Our issue P3 is sort of a mirror issue
18 of the Calhoun cleanroom issue, and it was just unclear to us
19 whether that dispute had been referred to Special Master Brush
20 or not.

21 I assumed, based on the comments in the Calhoun case that
22 it would likely be the same in ours, but we just were hoping
23 for some clarification there.

24 THE COURT: Your dispute P3?

25 MS. BONN: Correct, Your Honor.

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1 THE COURT: Yes, to the extent -- if that's a
2 cleanroom dispute, then that will be addressed by the special
3 master.

4 MS. BONN: Thank you, Your Honor. We appreciate it.

5 THE COURT: Yeah. I overlooked that.

6 MR. MAO: Sorry, Your Honor. This is Mr. Mao for the
7 plaintiffs for Brown.

8 I just did a close reading of what Your Honor just said,
9 which is that to the extent it includes the cleanroom access,
10 there is a portion of that which is beyond the cleanroom, which
11 is your prior order, Your Honor, on all unauthenticated data.

12 THE COURT: That's for the special master. The
13 production of plaintiffs' data is all for the special master.

14 MR. MAO: Thank you, Your Honor.

15 THE COURT: Aren't you glad you're here, Mr. Brush?

16 MR. BRUSH: I am, Your Honor.

17 And, actually, I was just going to key in. So it was a
18 perfect touchpoint. Just to go on record and, again, with
19 these two issues here, before me, I do want to reiterate, the
20 parties, we did have a conference informally a couple of weeks
21 ago. And just to go on record and be crystal clear about it,
22 please do not waste my or the Court's time with a lot of things
23 that are needlessly complicated. The issue themselves are
24 already complicated.

25 So as we look through these things, particularly around

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1 what's being asked for, we really want to avoid anything that's
2 a fishing expedition, overly broad. So really make sure you
3 tailor things, and really be thoughtful when you come to me.

4 I really want to be able to move through these issues
5 quickly and not, quite frankly, have do the work for you. So I
6 do expect the parties to come with things resolved to the
7 extent that they can, and then really ask me to help issues
8 that are not.

9 So, you know, by all means, please continue to work with
10 each other. I sat here for two hours. It sounds like
11 everybody is willing to. I want to reiterate that fact,
12 please, come to me with things in a more fully-baked form than
13 just "we want this" or "we want that."

14 MR. SCHAPIRO: Will do.

15 THE COURT: The disputes before Special Master Brush,
16 just as the disputes before me are the end of the meet and
17 confer efforts. The end of the meet and confer.

18 Now, I appreciate that, like today, where you get guidance
19 that warrants some further meet and confer, that's fine. I
20 know there was some back and forth, some tussling between the
21 parties on preparation of the summary charts. The charts, that
22 is never the place where you put a position that you hadn't yet
23 communicated to the other side.

24 There are no surprises in the chart. I think an argument
25 was made that: Well, we got, you know, these issues and we

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1 didn't have enough time to respond.

2 There should be no seeing issues for the first time by the
3 time you get the submission to the Court, or the submission to
4 Mr. Brush. Those -- the chart that comes before me and
5 submissions that you make to Special Master Brush, are the end
6 of your meet and confer process. They are not the start.

7 You have worked through it. And you have mutually agreed
8 that all you can do is disagree, and you need someone to call
9 it in or out, and that's what we're going to do.

10 All right?

11 I think the parties get that.

12 I also appreciate you've got deadlines, and clients, and a
13 tremendous amount -- a tremendous amount to accomplish. But
14 this is a highly capable group, and I'm confident you can get
15 there.

16 Other questions for the Court today?

17 Thank you, Special Master Brush. I appreciate that. I
18 wanted to be sure you did have a moment to address the group
19 with me. And I believe I referred to this earlier, let me just
20 make clear, Special Master Brush and I have conferred and we
21 will continue to confer as needed in the case. We will -- we
22 will be staying on the same page, so -- as you would expect.

23 Ms. Weaver, did you have a question?

24 MS. WEAVER: I did. Thank you.

25 And it's really, Mr. Brush, for you.

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1 We did have a request to submit additional briefing as a
2 result of our August 4th, 30(b) (6) deposition, which touches
3 upon the matters in front of you. We had raised it with
4 Judge van Keulen. You are now running the show. We wondered
5 if it's time for that to just update you, or how would you like
6 to handle that?

7 MR. BRUSH: Yeah. Have I been provided the transcript
8 of the 30(b) (6) from August 30th?

9 MS. WEAVER: August 4th. No, you haven't.

10 MR. BRUSH: I'm sorry. August 4th. My apologies.

11 MS. WEAVER: No worries.

12 MR. BRUSH: Yes. If I can get that, I would like to
13 review that to see what was brought up and if it gives context
14 or clarity around any of the issues.

15 MS. WEAVER: Okay. We can do that. But you do not
16 want any additional briefing, I am inferring; is that correct?

17 MR. BRUSH: That's correct. At this point, we're
18 still getting our feet on rest with this data to see what is
19 there, and if there are any issues with that. So just give me
20 a few moments with that, because more data is not going to be
21 potentially helpful at this moment.

22 But to that point too, you know, for the parties again,
23 you know, I would like to -- I would like to have an update
24 early next week on where we are, whether it's something that's
25 formally filed with the Court or otherwise, on the -- on the

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1 issues, if there is going to be an additional meet and confer
2 over the next 24 hours that helps resolve anything before it
3 comes to me.

4 MS. WEAVER: Thank you. Understood.

5 THE COURT: All right. Any other issue from
6 plaintiffs in either case for today, clarification of the
7 issues we've already addressed?

8 (No response.)

9 THE COURT: All right. And for Google in either case.

10 Mr. Schapiro?

11 MR. SCHAPIRO: Nothing, Your Honor. Thank you for
12 your time.

13 THE COURT: As always, I find counsels' input in this
14 process helpful. I know you worked hard to prepare for this,
15 as does the Court and the special master. So thank you for
16 that. And for everyone's attendance.

17 I do appreciate it, and it helps us to move smoothly.

18 I want to note for the record, I think this is our
19 shortest joint discovery hearing, in that we haven't yet hit
20 the two-hour mark. So I'm going to take that as progress.

21 All right. Keep up the hard work. Get me that submission
22 on Monday, as necessary. And I think the other deadlines are
23 quite clear. I will issue an order reflecting today's rulings.

24 Thank you. All right.

25 That concludes this matter and we're adjourned.

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1 MS. BONN: Thank you, Your Honor.

2 MS. WEAVER: Thank you, Your Honor.

3 MR. SCHAPIRO: Thank you.

4 (Proceedings adjourned at 11:18 a.m.)

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7 CERTIFICATE OF REPORTER

8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled matter.

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11 DATE: Friday, August 13, 2021

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17 Ruth Levine Ekhaus, RMR, RDR, FCRR, CSR No. 12219
Official Reporter, U.S. District Court

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